Human Rights Through the Lens of Islamic Legal Thought

Lecture 3 by Denis Bašić

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History Basics: “Rightly Guided Caliphs”

After the death of the Prophet Muhammad (632 C.E.) the four following “rightly-guided caliphs” led the Islamic world,

• **Abu Bakr** as-Sadiiq (632-634 C.E.)
• **‘Umar** ibn al-Khattaab (634-644 C.E.)
• **‘Uthman** ibn ‘Affaan (644-656 C.E.)
• **‘Ali** ibn Abi Taalib (656-661 C.E.)
Sunni-Shia Divide

- For a brief history of *The Sunni-Shia Divide*, watch the Council on Foreign relations video and read the given article.

- Also, read this NPR article and listen to this brief program for more on *The Origins of the Shiite-Sunni Split*.

• **INFERENCE** - (Logic) [the process of reaching] a conclusion on the basis of evidence and reasoning

• **INDUCTION** - (Logic) the inference of a general law from particular instances. The production of general facts to prove a general statement. Often contrasted with deduction. (For instance, a theory of war is induced after considering all Quranic verses and hadith related to warfare.)

• **DEDUCTION** - (Logic) the inference of particular instances by reference to a general law or principle. The theory is constructed on the basis of **logical reasoning**, usually prior to the investigation of the relevant facts, from a more comprehensive, general theory. (For instance, a theory of war deduced from a theory of international relations.)
Maqasid - Purposes - مقاصد
Higher Objectives

- What is the *maqasid approach* to the interpretation of the Quran?
- The *maqasid approach* emphasizes the goals, purpose, intent, and general objectives of the Qur’anic texts rather than the specific words and verses.

Kamali writes that the *maqasid* are “rooted in the textual injunctions of the Qur’an and the Sunnah . . . their main focus is the general philosophy and objectives of these injunctions often beyond the particularities of the text. This approach makes the *shariah* more accessible by avoiding the literalism, atomism, and conditions associated with the *usul (principles) methodology*. In this context, it should be recalled that the laws deduced from the *shariah* are not imposed for their own sake, but for the purpose of realizing certain objectives and benefits and avoiding certain harms. Kamali writes that “when there is change of a kind whereby a particular law no longer secures its underlying purposes and rationale, it must be substituted with a suitable alternative. To do otherwise would mean neglecting the objective of the Lawgiver [God.]”
Reverse Abrogation

- What is abrogation?

- As per his earlier work (1990), *Towards an Islamic Reformation*, An-Na'im advocates a methodology of interpretation based on reverse abrogation: "a shift in the basis of social and political aspects of shariah from verses included in the Medinan phase of the revelation of the Qur'an (622-632 CE) to those revealed during the Meccan period (610-622 CE). The rationale of this approach is that it would facilitate the development of alternative shariah principles based on the universal teachings of Islam found in the Meccan period rather than those of the Medinan period, which are more concerned with the specific historical, social, and political contexts of the Prophet Muhammad and his companions. This approach has been advocated by An-Na'im for the past two decades, but is yet to gain legitimacy in Islamic legal thought."

- The Meccan verses are more concerned with spirituality, address the humanity as a whole and are generally considered “milder” than the Medinan verses.
Historical Ancestors of Maqasid Approach

• While the concept of higher objectives (maqasid) can be seen in the approach and ruling of rulers as far back in Muslim history as the second caliph, Umar (d. 644), the actual term maqasid was not used in the writings of jurists until 300 years after the death of the Prophet Muhammad, when Abu Abd Allah al-Tirmidhi al-Hakim (d. 932) became the first scholar to use the term maqasid and to write specifically on the topic.

• It was not until more than a century later that Abd Allah al-Juwayni (d. 1085) who extensively used the term maqasid along with its derivatives, classified the three categories of maqasid: daruriyyat, hajiyyat, and tabsiyyat (essentials, needs, and enhancements). He is also credited as having been the first to define the major essentials as the protection of religion, human life, faculty of reason, progeny, and wealth. His student Abu Hamid al-Ghazali (d. 1111) expanded and developed these ideas, defining the punishments hudud.

• The sixth objective, preservation of honor, was subsequently added by Shihab al-Din al-Qaraf (d. 1285)
The fourteenth century Islamic scholar Abu Ishaq al-Shatibi (d. 1388), like many after him, emphasized the danger of conducting *ijtihad* (reasoning) on the basis of particulars in isolation rather than universals in context. He argues that both universals and particulars must be considered together.

Thus, Shatibi regards induction (*istiqra*) as yielding "complete certainty" as an inductive reading is not based on a single piece of evidence but upon numerous such pieces, which together "convey a single message which is thereby invested with complete certitude." It is through this method that Shatibi bases his conviction that Islamic law is best explained in terms of the preservation of human (public) interests or *maslaha* (commonwealth).

Al-Ghazali outlined the central objectives of Islamic law in terms of intents and interests, both "spiritual" and "worldly." His work is attributed with having set the parameters for the understanding and application of the *maqasid*. Although these parameters were somewhat reshaped by Abu Ishaq al-Shatibi, they have continued to influence and constrain the thinking of *maqasid* even until today. In the two centuries between al-Ghazali and Shatibi, the influence of al-Ghazali can clearly be seen in terms of the direction in which the theory of *maqasid* developed.
Muhammad al-Gazali (1058-1111)

- was a Muslim theologian, jurist, philosopher, and mystic of Persian descent, influential in the Sunni Islam. Al-Ghazali has been referred to by some historians as the single most influential Muslim after the Islamic prophet Muhammad. Within Islamic civilization he is considered to be a **Mujaddid** or **renewer of the faith**, who, according to tradition, appears once every century to restore the faith of the community. His works were so highly acclaimed by his contemporaries that al-Ghazali was awarded the honorific title "**Proof of Islam**" (Hujjat al-Islam). Others have cited his opposition to certain strands of Islamic philosophy as a detriment to Islamic scientific progress. Throughout the classical period of Islamic thought, there were always some thinkers who distrusted rationalism and logic, certain that the study of philosophy results in a loss of faith. Al-Ghazali and Ibn Taymiyya are the two best known examples. Thus, al-Ghazali attacked Aristotle and his followers, al-Farabi and Ibn Sina, particularly objecting to the Aristotelian notion of the eternity of the world, which he found irreconcilable with the Qur'anic description of God's creation of the world from nothing. Al-Ghazali also saw this as an idea which limited God in a totally unacceptable manner. He also brought the orthodox Islam of his time in close contact with **Sufism**. It became increasingly possible for individuals to combine **orthodox theology (kalam)** and Sufism, while adherents of both camps developed a sense of mutual appreciation that made sweeping condemnation of one by the other increasingly problematic.
Ibn Taymiyyah (1263-1328)

• The concept of *maqasid* was expanded in the fourteenth century by Ibn Taymiyyah, who identified a more open-ended list of values that included *fulfillment of contracts, preservation of kinship ties, honoring the rights of one's neighbors, sincerity, trustworthiness*, and *moral purity*.

• He raised objection to the *usuli* position that limited the essential objectives of Islamic law to the five expounded by al-Ghazali, going so far as to state that these five or six do not represent the highest or most significant of objectives.

• The work of Shatibi, however, made a profound contribution to developing the theory of *maqasid* by focusing on the concept of *maslaha or public interest* as an approach to overcoming the rigidity imposed by *literalism* and *qiyas* (*analogical reasoning*).
Modern Proponents of Maqasid Approach:

- Expressing the need for an objective-based approach to Islamic law in light of modern realities, the Tunisian scholar, Ibn Ashur (d. 1973) introduces to the theory of *maqasid* the *preservation of the family system, freedom of belief, orderliness, natural disposition, civility, human rights, freedom,* and **equality** as objectives of Islamic law.

- Yusuf Qaradawi (b. 1926-) has further extended the *maqasid* list to include **social welfare support, freedom, human dignity,** and **human fraternity.**

- Muhammad Hashim Kamali (b. 1944) has added to this list the **protection of fundamental rights and liberties, economic development,** along with **research and development in science and technology.**

- Like their predecessors, both scholars based their additions on relevant supporting texts of the Quran and Prophetic Traditions. Kamali (2006) contends that the *maqasid* remains dynamic and open to expansion according to the priorities of every age.
Obstacles to the Maqasid Approach:

- In isolation, however, the theory of maqasid remains deficient to the extent that it does not systematically address the issue of context.

- Abdullah Saeed, for instance, regards the maqasid as an important theoretical basis for context-based interpretation, but contends that its historical formulation has rendered it “too restrictive to be considered as a basis for liberal interpretations of the Qu’ran.”

- The major obstacle for the maqasid approach in Saeed's opinion is the authoritative method of usul al-fiqh (principles of jurisprudence), which does not allow for interpretation on the basis of context, intent, purpose, or circumstances, in the case of clear instructions or statements in the Qur’an or Prophetic traditions. Commenting that the demand of the Usul method for following the text negates a maqasid-oriented approach, Saeed laments that “maqasid is thus often reduced to a form of empty rhetoric as far as ethico-legal texts are concerned.”
Contextualization is an approach to interpreting the Qu’ran that requires consideration of the text as a whole, the position of verses within the text, the circumstances or conditions of the Prophet Muhammad and the early Muslim community at the time of the revelation, and the contemporary situation or issue for which the Qur’anic guidance is sought. Diversity in interpretation is to be expected with differing experiences, beliefs, prejudices, and values of different interpreters.

Among the Modern Islamic scholars who have developed methods of contextualization are Fazlur Rahman (d. 1988), Abdul Hamid Abu Sulayman (b. 1936), and Abdullah Saeed.
Rahman’s “Double Movement”

- **Rahman** advocates a contextualist process of interpreting and applying the Qur’an that he refers to as a "double-movement." The process involves a movement from a contemporary issue to Quranic times (1st movement) and then back to the present (2nd movement).

- The first movement requires one to first "understand the import or meaning of a given statement by studying the historical situation or problem to which it was the answer." This step, along with the general, preliminary, historical study is necessary for an understanding of the "meaning of the Quran as a whole in terms of the specific tenets that constitute responses to specific situations"

- The second step is the generalization of the specific answers and to enunciate them as "statements of general moral-social objectives that can be distilled from specific texts in light of the sociohistorical background and the often stated rationes legis.”
Abullah Saeed’s Contextualism

• **Abdullah Saeed** (2006) presents a comprehensive argument for the replacement of the traditional “legalistic-literalistic” approach to interpreting the Quran, particularly the ethico-legal verses, with an approach-based contextualization.

• Saeed has developed a three-fold framework for a contemporary approach to interpreting the Quran involving a new classification of Quranic verses, a new hierarchy of Quranic values, and a new model for interpretation.

• Saeed's four-stage model for interpretation begins with
  • the text of the Quran in its context, followed by
  • a linguistic and literary examination of the words of the text, then
  • an examination of the original meaning of the text for its first recipients in their socio-historical context, and finally
  • the meaning of the text in reference to contemporary circumstances.
The combination of *maqasid* and contextualization approaches involves

- reading all of the relevant Quranic verses on a particular issue on the basis of *istiqra* or thematic induction,

- considering the historical, social, and political context in which they were revealed, and ascertaining the overriding objectives that emerge from this reading. Once the higher objectives (*maqasid*) of a collection of verses concerning a particular issue are identified,

- interpretation of particular verses should then be made on the basis of these objectives and should not be made in contradiction to the identified *maqasid*.

- This methodology has the potential for broad application to a range of issues concerning Islam and modernity, including human rights.
Women’s Rights
based on Rane’s Combined Approach
The Rules of Marriage

• The underlying principle of the Quranic verses, according to Halim Rane is

  • that a woman is an independent entity with rights (Quran 2:233 and 4:32) whose will is acknowledged (Quran 2:231-232) and who is in charge of her own affairs (Quran 33:50).

  • Men are regarded by the Quran as carers of women (Quran 4:34) but that women should have a say in decision making is expressed as normative (Quran 28:26).

  • Moreover, the relationship between spouses is intended by the Quran to be a partnership (Quran 42:11) and the expectation is that women should be treated with kindness and fairness (Quran 4:25 and 33:49).
According to Halim Rane, “the Quran repeatedly stresses the equality of believing men and women and the equal rewards they should expect to receive for their good deeds (Quran 3:195, 33:35-36, 40:40, 16:97, 48:5, 48:25, 49:11, 57:12, 57:18, 85:10, 71:28, 47:19, 9:72). However, the Quran acknowledges that both men and women are capable of both good and bad (Quran 48:6, 57:13, 24:26, 33:73, 9:67-71). Certain women are criticized in the Quran for their faithlessness, namely, with wives of Noah and Lot (Quran 29:32-33, 66:10, 7:83, and 11:81), while others are highly praised, such as the wife of the Pharaoh (Quran 28:9 and 66:11) and Mary the mother of Jesus (Quran 5:75, 5:110, 23:50, 66:12, and 3:42). The Quran does not accept the idea of original sin or ascribe specific blame to women. Rather, the book elaborates on the creation of man and woman in terms of equality (Quran 2:35, 7:19, 20:117, 39:6, 4:1, and 7:189). It also ridicules customs underlined by notions of gender inequality (Quran 6:139) as well as the idea that sons are superior to daughters (Quran 6:100, 37:149, 37:153, 43:16, 43:18 and 52:39).

In terms of equality, does the Qur’an and Hadith promise 72 husbands to women in the afterlife as 72 virgins are promised to men? How to understand this promise? How do the verses 33:35 and 37:48 compare in terms of rewards in the Hereafter.
In the context of marriage and divorce, the equality of men and women is continually emphasized.

The very basis of marriage according to the Quran is "love and compassion" (Quran 30:21).

The Quran advocates that marriage should take place based on equitable terms (Quran 4:3-4, 4:25, and 4:127).

Similarly, divorce should be conducted on the basis of equality and fairness (Quran 4:130, 4:128, 65:1, 65:6, 2:231-232, and 2:241).
Women’s Dignity


• Besides, the Quran considers the participation of women in society as normative (Quran 28:23, 12:30-33, 12:51, and 3:61). It accepts a role for women in economic affairs (Quran 2:282) as well as their political participation (Quran 60:12). The book even gives legitimacy to female leadership through its discussion of the Queens of Sheba (Quran 27:36-38) and particularly the description of her throne as "mighty" (Quran 27:23).
• **Quran 4:7:**
  For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an obligatory share.

• **Quran 4:11-12**
  Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise.

• Explain how Islamic theologians justify this obvious inequality in inheritance. (Collectivism vs. Individualism - greater good - maslaha)
According to Halim Rane, “such verses as 2:282, which on the surface may suggest that the testimony of a woman is worth half as much as that of a man should be read in the social and historical context of 7th-century Arabia. Economic participation and witnessing business contracts was a male privilege. The Quran legitimized the involvement of women in such activities. The provision of one male to two female witnesses should not be seen as a matter of female inferiority but a tactical response to prevailing social norms. The full and equal participation of women is consistent with the overall message of the Quran.”
According to Halim Rane, “Similarly, for verse 4:34 to be read as an endorsement of women’s subservience to man is to read this verse in contradiction to the spirit of the Quran. The prevailing norms of seventh-century Arabia meant that the well-being of women was dependent on men, their fathers, brothers, and husbands. The Quran, however, makes provision for the full and equal social, economic, and political participation of women and is therefore open to change in social norms that would allow women to be more independent of men. The ability of women to inherit, own property, and remain in charge of their own affairs suggests that the Quran supports this level of equality.”

Is Rane avoiding the discussion of wife beating mentioned in 4:34?

Does not the verse 2:228 clearly state that men “are a degree above [women]? Has Rane mentioned this verse?
Religious Minorities Rights
based on Rane’s Combined Approach
According to Halim Rane, “The dignity of all human beings is a principle established by the Quran irrespective of religion. It states that God has conferred dignity on the children of Adam and preferred them above other creations (Quran 17:70). From this perspective, all human beings are entitled to be treated justly and equitably (Quran 60:8). Moreover, the Quran advocates good relations between all human beings; the religious convictions of people are not meant to be a determinant of relations or conduct toward one another (Quran 4:94).”

Also, pay attention to the verse 5:48 which states that the existence of multiplicity of religions is a matter of God’s intention. Jews, Christians, and Muslims of Medina were asked to compete in all virtues until they all return to God to teach them about the reasons for their differences.
The Quranic Criticism of Non-Muslims

• “This is not to suggest that the Quran is uncritical of certain non-Muslims. The Quran discusses the rivalry between Muslims, Christians, and Jews over such matters as ancestry and relations with God (Quran 2:120, 2:135, 2:139, 2:140, 3:140, 3:67, 5:18).

• Jews are especially criticized in the Quran for hostility toward the Muslims (Quran 5:82) and distorting the meaning of God's word (Quran 4:46 and 5:41).

• The Quran even advises Muslims against taking non-Muslims as protectors or allies (Quran 5:51). However, the Quran clarifies that this instruction on allies refers to those who were fighting against the Muslims because of their faith and drove them from their homes (Quran 60:9).”

• Check the sequence of the revelation order of the Quran and see how the Muslim opponents of interreligious friendship could use it to prove that the verse 5:51 is in power.

• Now read the verses 5:40–86 all together and explain how these verses could be used to define the relations between Muslims, Jews and Christians.
The verses that suggest adversarial relations between Muslims and non-Muslims were revealed in the context of war between Muslims and non-Muslims (Quran 66:9 and 9:73).

The Quran is unambiguous concerning the rationale of fighting. Muslims were given permission to fight against non-Muslims not because of faith but in response to aggression and oppression (Quran 22:39-40, 9:17, 8:39, 8:34).

Even the so-called sword-verse (Quran 9:5) is followed by two verses that instruct Muslims to give protection to non-Muslims who seek their protection (Quran 9:6-7). Moreover, the Quran advocates that upholding a treaty with non-Muslims takes priority over the obligation to protect people from their oppression (Quran 8:72).
According to Halim Rane, “Such verses that address hostility between Muslims and non-Muslims do not detract, however, from the Quran's declaration that all human beings are accountable to God (Quran 2:139, 4:42, and 22:17) and that all those who believe and do good deeds, including Christians and Jews, shall be rewarded by God (Quran 2:62, 5:69, 22:17).

In sum, Quranic verses critical of non-Muslims, including those concerning matters of faith, occur in reference to particular historical contexts. Others that appear to encourage hostility between Muslims and non-Muslims occur in the context of war and relate to treaty obligations, aggression, oppression, and freedom of religion. The maqasid established by the Quran regarding all human beings, non-Muslims included, are treatment of others with dignity, fairness, and equality.

What Rane is here alluding at is that Muslims believe that if someone honestly believes in God, s/he would never be immoral and haughty.
Freedom of Religion
based on Rane’s Combined Approach
According to Rane, “Although in not a single verse of the Quran is there a provision for any sanction or punishment for those who choose not to profess Islam, exclusivist and intolerant claims by Muslims vis-a-vis other religions stem from a repeated statement of the Quran that the only religion accepted by God is Islam (Quran 3:19, 3:85, 5:3, 9:33, and 48:28).

These verses seem to stand in contrast, however, with others that express that there is no coercion on religion (Quran 2:256, 10:99, and 109:6), declare great rewards for all those who have faith in God and do righteous deeds (Quran 2:25, 3:57, 4:122, 5:9, 6:82, 7:42, 8:74, 9:88, 10:4, 20:82, 24:55, 30:15, 41:8, 48:29, 57:7, 65:11, 95:6), and even advocate jihad for the defense of other religions that worship God (Quran 22:39-40).”
“How to reconcile these previously mentioned apparent contradictions?

Perhaps consideration should be given to the words used in their literal sense. If read in this way then what the Quran is saying is that the only "way of life" (din) accepted by God is “submission to God” (Islam).

The Quran uses this very approach in settling the dispute between Muslims, Christians, and Jews, as to the religion of previous Prophets. The Quran states that they were "Muslims" as they submitted themselves to the will of God (Quran 3:67 and 2:140). [see also 2:136, 3:84] Moreover, the Quran repeatedly states that religion or the way of life involving submission to God was the same throughout history (Quran 26:137, 2:132, 2:183, and 42:13).”

The Quran considers Jesus, as well as his apostles Muslims (Quran 3:52-53) and promises them Paradise (3:55).
The True Faith

• According to Rane, “As far as the concept of faith is concerned, the Quran provides extensive descriptions of faith (none of which preclude non-Muslims), including

• loving God above all else (Quran 2:165),
• enjoining what is just and forbidding what is unjust (Quran 3:110),
• doing righteous deeds (Quran 98:7 and 103:3),
• being constant in prayer and giving charity regularly (Quran 2:43, 2:254, 4:162, 5:55, 8:3, 14:31),
• being fair and kind to one's spouse (Quran 4:19),
• being patient in adversity (Quran 103:3 and 3:200), and
• honoring pledges and being true to one's word (Quran 5:1, 61:2).”
According to Rane, “The Quranic verses that may be read in support of a hostile response to non-Muslims and the supremacy of Islam (such as Quran 9:5 and 9:29) should be read in their historical context. Specifically, the wars that raged between the Muslims and non-Muslim Arab tribes during the last decade of the Prophet Muhammad's life that involved acts of overt aggression, expulsion from homes, and a denial of the right to freedom of religious conviction.

Even within the context of such hostilities, the Quran maintained that hatred of others should not prevent them being treated justly (Quran 5:8), that non-Muslims may be invited to accept Islam (Quran 9:6-7) but not compelled to accept (Quran 10:99), treated with forgiveness (Quran 45:14), kindness, and equality (Quran 60:8), and that peaceful relations should be pursued (Quran 4:90, 8:61).”
How about the freedom not to believe?

- According to Rane, “Outside of the context of war and hostility, the Quran does not endorse a posture of adversity toward non-Muslims. Submission to the will of God is regarded as a preferable way of life for human beings but is regarded as a matter of conviction that some human beings will embrace, while others remain free to reject [Quran 2:256]. In sum, the maqasid of these verses are the preservation of conditions under which human beings are free to choose their religious convictions.”

- Rane’s opponents would point at the Quranic verses that sound intolerant towards apostates (4:88-89) and polytheists (11:5-12), as well as to several hadithes related to apostates [Sahih Bukhari (52:260), Sahih Bukhari (83:37), Sahih Bukhari (84:57), Sahih Bukhari (89:271), Sahih Bukhari (84:58), Sahih Bukhari (84:64-65), Sahih Bukhari (11:626), Abu Dawud (4346), etc.]

- Remember what Anthony Chase said in lecture notes 2 in terms of the danger of having one religion or a religious view dominate the entire public sphere.

- Remember what Abdullah Saeed said in terms of the weaknesses of the maqasid (Higher Objectives) approach.